IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

PAUL BRAIN and VANESSA HERZOG, husband and wife, on behalf of themselves and as a class consisting of the members of the Canterwood Homeowners Association,

Appellants/Cross-Respondents,

v.

CANTERWOOD HOMEOWNERS ASSOCIATION

Respondent/Cross-Appellant.

RESPONDENT/CROSS-APPELANT CANTERWOOD HOMEOWNERS ASSOCIATION'S BRIEF

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I. INTRODUCTION

The Appellants/Cross-Respondents are Paul Brain and Vanessa Herzog (collectively, "Mr. Brain"), husband and wife, who own a single family residence located in Canterwood. Canterwood is a gated residential community located in Gig Harbor, Washington consisting of approximately 750 homes.

The Respondent/Cross-Appellant is the Canterwood Homeowners Association ("Canterwood" or "the Canterwood HOA"), a non-profit corporation organized as a homeowners association. The Canterwood HOA was formed "to provide for maintenance, preservation, and architectural control of buildings, grounds, and common areas."

Mr. Brain's First Amended Complaint (the "Complaint") alleged the Canterwood HOA had waived or was estopped from enforcing the "Tree Policy" contained in the written Residential Guidelines adopted by the Canterwood Architectural Control Committee (the "ACC"). The Complaint included a putative class action and sought both Declaratory and Injunctive Relief. The trial court correctly dismissed Mr. Brain's Complaint after concluding that the non-waiver clause contained in the Amended and Restated Declaration of Conditions, Covenants, and Restrictions for the Canterwood Homeowners Association, recorded on March 18, 1988 under Recording No. 8803180143

(the "CC&Rs") barred Mr. Brain's claims. The trial court could have also dismissed Mr. Brain's Complaint for lack of standing, pursuant to the business judgment rule, and/or Mr. Brain's attempt to use equitable defenses improperly as a sword. The trial court also correctly denied Mr. Brain's request for class certification as moot after dismissal of all claims.

After dismissal of Mr. Brain's Complaint, the Canterwood HOA moved for an award of its attorney fees. The trial court improperly denied an attorney fee award when such an award was mandatory based on the attorney fee provision in the CC&R's and the operation of RCW 4.84.330. Mr. Brain's action was (1) "on the contract" – the CC&Rs; (2) the CC&Rs contain a unilateral attorney fee provision; and (3) the Canterwood HOA was undisputedly the prevailing party by virtue of the court granting its motion to dismiss the complaint. As a result, the trial court should have awarded the Canterwood HOA its attorney fees and this court should remand for a Lodestar calculation of the appropriate amount.

II. ASSIGNMENTS OF ERROR

Canterwood assigns no error to the trial court's decision to dismiss the complaint.

Canterwood assigns no error to the trial court's decision to

deny class certification.

Canterwood assigns error to the trial court's decision to not award attorney fees to it. Under RCW 4.84.330 and the leading cases interpreting it, an award of attorney fees to Canterwood was mandatory here.

III. STATEMENT OF CASE

A. Mr. Brain's Complaint.

All owners and occupants of dwelling units in the Canterwood Development are subject to, and must comply with the CC&Rs, Bylaws, and Design Guidelines. CP 179-185. Mr. Brain, as an owner in the Canterwood Development is therefore subject to the CC&Rs. CP 179; 182-83. The CC&Rs require owners to submit plans and specifications to the ACC for approval prior to constructing certain improvements on their lots and for certain landscaping. CP 106-07. The CC&Rs specify the permitted and prohibited uses and the CC&Rs authorize the ACC "to adopt and amend written guidelines to be applied in its review of plans and specifications, in order to further the intents and purposes of [the CC&Rs] and any other covenants or restrictions covering the properties." CP 106.

The gravamen of Mr. Brain's Complaint concerns a dispute over the so-called "Tree Policy". More specifically, Mr. Brain contends he is entitled to declaratory relief that:

(1) Plaintiffs are entitled to a declaration that as a result of the arbitrary and capricious basis for enforcement of the tree policy, the selective burden placed on plaintiffs' property and those of similarly situated homeowners and, patter of non-enforcement/selective enforcement of the "tree policy" and authorizing CCR provision, the HOA has waived or is estopped from asserting that the tree policy is enforceable [CP 88];

(2) Plaintiffs are entitled to a declaration that as a result of the pattern of non-enforcement/selective enforcement of the Guidelines referenced above, including without limitation §§ 2.3, 2.5, 4.2, 4.3, 5.1, and 5.2(e), the HOA has waived or is estopped from asserting that the Guidelines are enforceable. [CP 88].

Additionally, the Complaint seeks various forms of injunctive relief. More specifically, Mr. Brain seeks a permanent injunction concerning the following issues:

(1) Precluding the HOA's Board/ACC from taking any action to enforce the Guidelines relating to landscaping and buffers and the "Tree Policy" [CP 89];

(2) Precluding the HOA from accepting or processing any new applications for ACC approval with respect to the Guidelines relating to landscaping and buffers, including without limitation §§ 2.3, 2.5, 4.2, 4.3, 5.1, and 5.2(e) and, including the tree policy until such time as Guidelines and a tree policy are in

place conforming to the actual physical conditions within Canterwood after consultation with both the Canterwood community and competent professional advisors [CP 89];

(3) Requiring the HOA to immediately institute proceedings to revise the Guidelines to conform to the actual physical conditions within Canterwood after consultation with both the Canterwood community and competent professional advisors [CP 89];

(4) Barring the HOA from adopting any new or amended [sic] any Guidelines during the pendency of this litigation [CP 89]; and

(5) Compelling the HOA to take immediate steps to rectify safety hazards from lack of maintenance in the common areas [CP 89].

B. The CC&Rs and the HOA's powers.

The HOA is authorized to exercise all powers and privileges and perform all of the duties and obligations as set forth in the CC&Rs. CP 187; CP 197. The Canterwood HOA's affairs are managed by the Board of Directors (the "Board"), which is authorized to exercise for the HOA all powers, duties, and authority vested in or delegated to the HOA by the Bylaws, Articles of Incorporation, and/or the CC&Rs. CP 187-88.

C. The CC&Rs establish the Association's power to own, maintain, and administer Common Areas and to enforce the covenants and restrictions.

The CC&R's further provide that the Canterwood HOA has the authority to own, maintain and administer the common area, administer and enforce the covenants and restrictions, and disburse any charges created in the CC&R's. CP 92. "Common areas" are defined as all real property and improvements owned or leased by the Association for the use and enjoyment of the members. CP 94. The CC&R's further provide that the Canterwood HOA "shall maintain, repair, replace, and improve the common areas as appropriate…and shall pay actual costs of the same from annual or special assessments as appropriate." CP 95.

D. The CC&Rs create and authorize the ACC to adopt the "Tree Policy" in the Residential Guidelines.

The CC&Rs provide that the Board "shall" appoint an ACC. Pursuant to the CC&Rs, the ACC must consist of three to seven persons who are appointed by the Board. CP 106. The ACC is authorized to review and act upon proposals and plans submitted, and to perform other duties set forth in the CC&R's, including adopting and amending written guidelines to be applied in its review of plans and specifications, in order to

further the intents and purposes of the CC&Rs. CP 106.

The "tree policy" originates from Article IX of the CC&R's which governs architectural and landscape control, and provides that plans and specifications must be approved in writing by the ACC before any HOA member may cut or remove any tree which is greater than six (6) inches in diameter at a point four (4) feet above ground level, or before removal of any living plan or tree from any portion of a lot which is in a setback area. CP 107. It further provides that the ACC may withhold approval of such plans and specifications if the proposed action is at variance with the covenants or design guidelines. CP 109.

E. The Guidelines and so-called "Tree Policy"

The Mission Statement of the Canterwood Homeowners' Associations' Residential Guidelines provides that the ACC is to serve the Canterwood Homeowners by facilitating controlled and aesthetically appropriate growth and to maintain and enforce the standards established by the CC&R's. CP 127. The Guidelines expressly state that "the overriding design goal shall be to preserve the existing native landscape as much as possible, and that the "existing natural landscape [trees and plants] should be preserved as much as possible." CP 127; CP 128. The so-called "tree policy" is found in Section 5 of the Guidelines. CP 133-34. While significant modification to existing landscapes or hardscapes must be presented to the ACC for approval,

homeowners have the right to maintain and manage the landscaped zone of their property, as long as they follow the following Guidelines:

1. Tree Removal: Removal of any tree which is greater than six (6) inches in diameter at a point four (4) feet above the ground level must be approved in writing by the ACC. CP 134. Smaller trees may be removed without ACC approval. CP 134.

2. Limbing: Restrictions on performing the following without ACC approval: limbing the lower 20% of any single tree's total height, limbing of five (5) or more trees, and topping of conifer trees. CP 134. The following activities do not require ACC approval: trimming limbs overhanging the roof line and pruning decorative or deciduous trees. CP 134.

Importantly, the Residential Guidelines are entirely consistent with the CC&Rs, as the CC&Rs expressly provide as well that the ACC must approve "the cutting, damaging, or removal of any tree which is greater than six (6) inches in diameter at a point four (4) feet above the ground level." CP 107.

F. CC&Rs non-waiver provisions.

The CC&R's contain two "non-waiver" provisions, one of which states that approval by the ACC of any plans, drawings, or specifications is not considered a waiver of the right to withhold approval of any similar such plan, drawing or specification, or

matter submitted for approval. CP 107. The second non-waiver provision, provides:

> No delay or omission on the part of [the HOA] in exercising any rights, power, or remedy provided in this Declaration shall be construed as a waiver of or acquiescence in any breach of the [CC&R's] set forth in [the CC&R's]. No action shall be brought or maintained by anyone whatsoever against [the HOA] for or on account of its failure to bring any action for the breach of these covenants, conditions, reservations, or restrictions or for imposing restrictions which may be unenforceable.

CP 120.

G. Amendment of the CC&Rs.

Amendment of the CC&Rs requires a vote of seventy-five (75%) of the HOA's members. CP 120-21. Any such amendment "must be in writing and signed by the approving members or owners, and must be recorded." CP 121.

H. The trial court grants Canterwood's motion to dismiss and denies class certification.

On October 20, 2021, the Canterwood HOA moved to dismiss Mr. Brain's Complaint. CP 157-174. The trial court treated Canterwood HOA's motion as a CR 56 summary judgment motion because it considered evidence outside the Complaint and then dismissed Mr. Brain's claims as to the property owners at large, but found that Mr. Brain could proceed on his own individual claim. CP 445. The following colloquy

between the court and Mr. Brain occurred during oral argument on the motion:

> MR. BRAIN: Well, the complaint actually alleges that we have been threatened with an enforcement action because our fairway side of the property doesn't conform to the requirements of the landscaping guidelines.
>
> THE COURT: Then as to your particular property, the action can continue. I don't have any problem with that –
>
> MR. BRAIN: All right.
>
> THE COURT: -- because you have the entitlement to contest whatever it is. But there is a method in the CC&Rs for amendment of the CC&Rs. It is inappropriate, in light of that remedy, for the Court to intervene and simply say that these have been abandoned because I don't think they have been abandoned. On that basis, I'm going to grant the motion to dismiss as to the property writ large. As to your individual claim, that has vitality. I don't see any reason why you can't challenge that action Mr. Brain.

CP 432-33. More discussion over Mr. Brain's individual claim ensued and Mr. Brain told the court:

> MR. BRAIN: Yes. I think we were explicit that we believe the actions of the ACC was arbitrary and capricious, and, of course, we have alleged that those actions have caused property damage.

CP 440.

Based on Mr. Brain's representations to the court that Canterwood's actions violated the CC&Rs and that he suffered damages, Canterwood submitted a proposed order for only a

partial dismissal of Mr. Brain's claims (leaving his individual claim pending). CP 400. Mr. Brain then decided his representations to the Court were not beneficial to him, so he argued: "While the proposed form of order at Section B(e) references a damage claim by Plaintiffs, Plaintiffs never pled a damage claims (sic)." CP 443. In the same pleading, he later noted: "[s]o, Plaintiffs find themselves objecting to this form of order because it did not dismiss the action in its entirety." CP 444. As a result of Mr. Brain's objection, the court entered an order dismissing the entirety of the action, including Mr. Brain's individual claim. CP 445-48. Thereafter, Canterwood moved for an award of its attorney fees and costs. CP 465-77. The trial court awarded costs, but declined to award attorney fees. CP 730-733.

IV. AUTHORITY AND ARGUMENT

A. The trial court correctly dismissed the complaint.

1. Standard of Review.

While Canterwood moved to dismiss the Complaint under CR 12(b)(6), the motion "was treated by the Court as a CR 56 Motion for Summary Judgment." CP 445. Accordingly, the standard of review on the trial court's decision to grant Canterwood summary judgment is de novo review. *Briggs v.*

Nova Services, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). This court "may affirm on any ground supported by the record." *Washington Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011).

2. Mr. Brain lacks standing because he has not suffered a concrete harm to sustain his declaratory relief action, and is merely seeking an impermissible "advisory opinion."

A plaintiff lacks standing if no justiciable controversy exists. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001). A justiciable controversy exists where there is "(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *Id*. "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro*, 144 Wn.2d at 411. The purpose of these requirements is to ensure the court will render a final decision on an actual dispute between opposing parties with a genuine stake in the court's decision. *Id*. "Absent these

elements, the court 'steps into the prohibited area of advisory opinions." *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994). In any action under the Uniform Declaratory Judgments Act, such as this one, the standing requirement tends to overlap with the justiciable controversy requirement. *To-Ro*, 144 Wn.2d at 411, n. 5.

Here, no justiciable controversy (and therefore, no standing) exists because no concrete harm and no actual dispute is present. The facts here are strikingly similar to *Pardee v. Evergreen Shores Beach Club*, 13 Wn.App.2d 1111, 2020 WL 3440572 (June 23, 2020) (Unpublished), *review denied*, 196 Wn.2d 1031, 478 P.3d 85 (2021). There, the homeowners sought declaratory relief that the Beach Club of which they were a member was required to convene an Architectural Control Committee every two years, which it had not done. *Id*. at *1. In affirming the trial court's summary judgment dismissal because the claim was non-justiciable, the Court held that:

> "the Pardees have neither argued nor presented evidence of any alterations made to lots either by them or other [ ] members that violate the covenants because of the lack of approval from an architectural control committee. They have failed to present an actual dispute that would render a decision by this court anything but an advisory opinion."

Id. at *10.

For the same reasons as stated in *Pardee*, Mr. Brain's Complaint is a request for an advisory opinion, which is improper. The Canterwood HOA is not attempting and has not attempted to enforce any CC&R or "Design Guideline" against Mr. Brain's property. In the absence of any such enforcement action, there is no justiciable dispute, controversy or standing, thus making any ruling of the trial court an impermissible "advisory opinion" and providing this Court a basis upon which to affirm the trial court's dismissal of Mr. Brain's Complaint.

3. The Business Judgment Rule bars Mr. Brain's claims.

Distilled to their essence, Mr. Brain's claims amount to a request for the court to substitute its judgment for that of the Canterwood HOA Board. Such a request is barred by the well-established business judgment rule, which cautions courts against substituting their judgment for that of a board of directors, absent evidence of fraud, dishonesty, or incompetence. *In re Spokane Concrete Prods., Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995). "Courts also apply the business judgment rule to actions of an owners association."[1] *Shorewood W. Condo.*

[1] The Court should note that whether the business judgment rule applies to a homeowners association (and not just the board members individually) is "an open question" in this state.

Ass'n. v. Sadri, 92 Wn. App. 752, 757, 966 P.2d 372 (1998) *rev'd on other grounds*, 140 Wn.2d 47, 992 P.2d 1008 (2000).[23] Mr. Brain presented no evidence of fraud, dishonesty, or incompetence, and as a result, the business judgment rule provides this court another ground on which to affirm the trial court's dismissal of his complaint.

Boards such as Canterwood's are afforded very broad powers under the CC&Rs and under Ch. 64.38 RCW to regulate the common areas at issue in this lawsuit. For instance, RCW 64.38.020 states "Homeowners' associations have the power to … [r]egulate the use, maintenance, repair, replacement, and

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Bangerter v. Hat Island Community Association, 199 Wn.2d 183, 193, 504 P.3d 813 (2022).

[2] At the appellate level in the *Bangerter* case, Division 1 held that the business judgment rule does not apply the determinations made by a homeowners association, *Bangerter v. Hat Island Community Association*, 14 Wn. App.2d 718, 737, 472 P.3d 998 (2020), but the Supreme Court did not adopt that per se rule.

[3] Division I also recently noted the Supreme Court's holding in *Bangerter*, in *Mullor v. Renaissance Ridge HOA*, 2022 WL 3025814 (August 1, 2022) (Unpublished) "when a homeowners' association makes a discretionary decision in a procedurally valid way, courts will not substitute their judgment for that of the association absent a showing of 'fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence)[.]'

modification of common areas." The Board has and is utilizing its sound business judgment with regard to the "Tree Policy". Mr. Brain's request that the court substitute its judgment for that of the Canterwood HOA Board's judgment is not proper based on the business judgment rule and provides this Court another basis on which to affirm dismissal of Mr. Brain's Complaint.

4. The non-waiver provisions in the CC&Rs also compel dismissal of the complaint.

Just as the trial court correctly concluded, this Court should also conclude that the non-waiver provisions of the CC&R's compel dismissal of Mr. Brain's Complaint. The first applicable non-waiver provision states that approval by the ACC of any plans, drawings, or specifications is not considered a waiver of the right to withhold approval of any similar such plan, drawing, or specification, or matter submitted for approval. CP 107. The second non-waiver provision states, in part, that "[n]o delay or omission on the part of [the HOA] in exercising any rights, power, or remedy provided in this Declaration shall be construed as a waiver of or acquiescence in any breach of the [CC&R's] set forth in [the CC&R's]." CP 120. As the court correctly noted:

> THE COURT: Equitable remedies might be available to any individual homeowner, but they are not available – equity is not available to vitiate a contractual document that everyone who purchased the property in Canterwood has relied upon.

> …
>
> THE COURT: I don't see an equitable remedy being imposed by way of contract recission for 750 people or homeowners.
> …
>
> THE COURT: I am preserving your individual claim, and the rest of them, no class certification, no injunctive relief, no invalidating of the CC&Rs.
>
> I'm doing that based on my belief that the nonwaiver clause would prohibit the invalidation of the CC&Rs.

CP 429; 439.

Accordingly, the presence of both of these non-waiver provisions provides this Court yet another basis upon which to affirm the dismissal of Mr. Brain's Complaint.

5. The claims based on estoppel/waiver are not cognizable, which also compels dismissal of the Complaint.

The Canterwood HOA has not engaged in any active enforcement action against Mr. Brain. As a result, his estoppel/waiver claims are being used not as an equitable defense (i.e., a shield), but instead being impermissibly used as a sword. This is not recognized in Washington, as the case law of this state demonstrates in numerous discussions outlining the only permissible use of equitable defenses is in response to the enforcement of restrictive covenants – not for the affirmative purposes Mr. Brain is attempting in this case. *See, e.g., Mountain*

Park Homeowners Ass'n, Inc. v. Tydings, 125 Wn.2d 337, 342 883 P.2d 1383 (1994) (allowing property owner to use abandonment/selective enforcement as defense to association's enforcement action to remove antenna from, and listing "abandonment" and "changed neighborhood conditions" among defenses to preclude enforcement of a restrictive covenant); *see also Mariners Cove Beach Club, Inc. v. Kairez*, 93 Wn. App. 886, 970 P.2d 825 (1999) (Beach club waived its right to bring suit to enjoin waterfront property owner's construction of dock based on architectural control committee's disapproval of plans when it failed to bring suit prior to completion of dock as required by restrictive covenant).

As further support for Canterwood's position, in a recent Division II case, *Byrd v. Pierce County*, 5 Wn.App.2d 249, 258, 425 P.3d 948 (2018), the Court held that a complaint that relies upon equitable estoppel as a cause of action was properly dismissed, as it failed to state a claim as a matter of law. There, the Court relied upon long-standing precedent that equitable estoppel is not available for offensive use by plaintiffs, and may only be used as a "shield or defense," and cannot be used as a sword. 5 Wn.App.2d at 257-58 (citing cases).

Moreover, Mr. Brain cites no case law to support his conclusory position that the claims relating to waiver/estoppel/abandonment can be used as affirmative claims.

As a result, the Court may presume no such authority exists. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

Here, as noted several times, there is no enforcement action or contemplated action by the Canterwood HOA against Mr. Brain for hypothetical violations of the CC&Rs, "Design Guidelines" or the so-called "Tree Policy." As such, the claimed equitable defenses of estoppel/waiver are not cognizable claims as a matter of law, and provide this Court another basis upon which to affirm the trial court's decision to dismiss Mr. Brain's Complaint.

6. Mr. Brain's Complaint amounts to a request to amend the CC&Rs, which can only be accomplished by a vote of the members.

An amendment to the CC&Rs requires a vote of seventy-five (75%) of the HOA's members. CP 120-21. Mr. Brain's Complaint seeks a declaration that the tree policy regarding the removal of any tree which is greater than six (6) inches in diameter at a point four (4) feet above the ground level is unenforceable citing the Guidelines. CP 88. Yet, such a request

is functionally equivalent to requesting a judicial amendment of the CC&R that is the source of the guideline. *See* CP 107. The CC&Rs restrict "the cutting, damaging, or removal of any tree which is greater than six (6) inches in diameter at a point four (4) feet above the ground level" without the approval of the ACC. CP 107. The trial court correctly recognized it could not grant such relief.

> THE COURT: Well, there is a process by which – what you're asking, Mr. Brain, is for this Court to rewrite the CC&Rs.
>
> MR. BRAIN: No, I'm not.
>
> THE COURT: Well, you are.
>
> …
>
> THE COURT: You're asking the Court to invalid (sic) those so that they can be reviewed and renewed by the ACC or the Homeowners Association or both. …There is a method … It is that 75 percent of the community or the interest holders can petition for amendment of the CCRs.
>
> MR. BRAIN: Invalidating and amending are two different things, Your Honor. Modified is something different than - -
>
> THE COURT: And (sic) invalidation is an amendment.

CP 425-26.

Accordingly, Mr. Brain's impermissible attempt to amend the CC&Rs via his lawsuit constitutes a sixth basis upon which this Court can affirm dismissal of the Complaint.

B. The Trial Court Correctly Denied Class Certification.

After dismissing the Mr. Brain's Complaint, the trial court correctly denied class certification under CR 23 as moot. CP 433. Because this Court should affirm the dismissal of the Complaint, it should also affirm the denial of class certification.

C. The Trial Court Should Have Awarded Attorney Fees to Canterwood.

1. Standard of Review.

"Whether a contract or statute authorizes an award of attorney fees is a question of law reviewed de novo." *McGuire v. Bates*, 169 Wn.2d 185,¶ 6, 234 P.3d 205 (2010). "Whether a party is entitled to attorney fees is an issue of law that we review de novo." *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 484, 260 P.3d 915 (2011). The applicability of RCW 4.84.330, in a suit on a contract that contains a unilateral attorney's fee provision, is a question of law that is reviewed de novo. *Wachovia SBA Lending, Inc. v. Kraft*, 138 Wn. App. 854, 858, 158 P.3d 1271, *aff'd* 165 Wn.2d 481, 488, 200 P.3d 683 (2007).

2. The Canterwood attorney fee provision applies here because of RCW 4.84.330.

The Canterwood CC&R's provide for an award of attorney fees and costs, stating as follows:

The Association and any owner shall have the right

> to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations…now or hereafter imposed by the provisions of this Declaration. Should the Association or any owner employ counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, all costs incurred in such enforcement, including a reasonable fee for counsel, shall be paid by the owner found to be in violation of said condition, covenant, reservation or restriction…. (Emphasis added).

CP 120.

Mr. Brain is expected to argue that (1) Canterwood is not entitled to its fees under this provision because there was no "enforcement action" and he was not "found to be in violation of said [CC&R]" and (2) his Complaint was for declaratory relief under RCW 7.24.020 and not based on the CC&Rs. Both of those arguments fail because RCW 4.84.330 applies here. RCW 4.84.330 applies when (1) the claims made are "on a contract"; (2) the contract contains a unilateral fee or cost provision; and (3) there is a prevailing party. *Wachovia SBA Lending*, 138 Wn. App. at 859.

a. Mr. Brain's Complaint is an enforcement action "on a contract."

Mr. Brain can be expected to argue that the CC&R's fee provision applies only in enforcement actions, and that

Canterwood repeatedly represented to the trial court this was not an "enforcement action." Canterwood's representations are true to the extent Canterwood was not pursuing an enforcement action. Mr. Brain fails to acknowledge that he was pursuing an "enforcement action" on a contract – the CC&Rs – against Canterwood that failed, which resulted in triggering the attorney fee provision.

Per *Wachovia,* the allegation of an enforceable unilateral contractual fee provision alone satisfies the "on a contract" element. 138 Wn. App. at 859. Moreover, an action is on a contract for purposes of a contractual attorney fee provision if the action arose out of the contract and if the contract is central to the dispute. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 855, 942 P.2d 1072 (1997); *Brown v. Johnson,* 109 Wn.App. 56, 34 P.3d 1233, 1234 (2001). Further still, the court may award attorney fees for claims other than breach of contract when the contract is central to the existence of the claims, i.e., when the dispute actually arose from the agreements. *See Hemenway v. Miller*, 116 Wn.2d 725, 742-43, 807 P.2d 863 (1991); *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991).

In his Appellant's Opening Brief, Mr. Brain also asks this Court to interpret Section 16.3 of the CC&Rs stating as follows:

> The first part of Section 16.3 states: "No

> delay or omission on the part of the Declarant or the owners of dwelling units . . . shall be construed as a waiver." The intention is clearly to preserve the right of homeowners or HOA to enforce the CCR in the event of a "delay or omission" by the Declarant or Association. Moreover, the provision clearly distinguishes between a failure to enforce the CCR as it may apply to an individual property owner and, a claim that the CCR are unenforceable as to all property owners.
>
> The second part of the provision addresses the latter situation and states: "No action shall be brought or maintained by anyone whatsoever against [the HOA ... for imposing restrictions which may be unenforceable." This is not an "anti-waiver" provision.
>
> There is an issue of construction here.
>
> Appellant's Brief at 24-25.

Mr. Brain is asking this Court to interpret the CC&Rs, which is the contract at issue making the CC&Rs unequivocally central to the existence and providing the alleged basis for Mr. Brain's suit for a declaratory judgment and injunctive relief.

b. The Canterwood Fee Provision is unilateral and therefore Applies When a Party Successfully defends a claim.

Mr. Brain has argued the Canterwood fee provision only awards fees against the party upon which the CC&Rs have been enforced because it does not provide that fees would be awarded to the party who successfully defends against a claimed violation. Thus, his own argument demonstrates that the fee provision is

unilateral, i.e. it only applies if a violation is found, not if the claim for an alleged violation is dismissed. "Washington public policy forbids one-way attorney fee provisions." *Mahler v. Szucs*, 135 Wn.2d 398, 425 n.17, 957 P.2d 632 (1998), citing RCW 4.84.330. As a result of the Legislature's clear policy decision to prohibit unilateral attorney fee provisions in contracts, "[t]he language [of RCW 4.84.330] must be read into a contract that awards fees to one party..." *Wachovia SBA*, 165 Wn.2d at 489. "RCW 4.84.330 is designed to make a unilateral attorney fee provision bilateral when a contracting party receives a final judgment." *Id.* at 494. RCW 4.84.330 provides in material part as follows:

> In any action on a contract or lease where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract . . . or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.
>
> Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease . . . Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Quality Food Centers v. Mary Jewell T, LLC, 134 Wn. App. 814, 142 P.3d 206 (2006) establishes the Canterwood HOA fee provision is unilateral and Mr. Brain's expected argument to the contrary lacks merit. In *Quality Food Centers*, the lease contained an attorney's fees provision substantially the same as the Canterwood fee provision that stated "the breaching party shall pay the other party's reasonable attorneys' fees incurred as a result of the breach of the Lease by the other party . . ." *Id.* at 816. The tenant sued the landlord for breach of the lease (just as Mr. Brain sued Canterwood for breach of the CC&Rs). The landlord successfully defended against the tenant's claims and requested an award of its fees (just like Canterwood here). *Id*. The Court of Appeals applied RCW 4.84.330 and concluded the landlord was entitled to its fees (just as Canterwood is here). The tenant argued the fee provision was "already bilateral because it does not specifically name one party but provides for potentially either party to get fees." The Court disagreed concluding as follows:

> The fee provision here provides that the breaching party must pay the other party's attorney fees incurred as a result of the breach of the lease. A party accused of breach could never recover attorney fees, no matter how frivolous the action. Admittedly, the lease does not say that only the landlord or only the tenant can recover fees. Regardless of who was accused of breach, the other party could recover fees if it was successful. However, it is the one-sidedness of the availability

> of fees in the particular controversy that makes the provision unilateral.
>
> Because the provision is unilateral, it triggers RCW 4.84.330. RCW 4.84.330 requires that fees be made available to either party to the controversy or to neither party. The parties may not contract to avoid this statutory requirement. Thus, RCW 4.84.330 mandates that [the landlord] be awarded its fees and costs incurred in successfully defending the breach of lease claim. (Emphasis added).

Id. at 818.

Accordingly, just as in *Quality Food Centers*, the fee provision at issue here is unilateral and RCW 4.84.330 applies.

c. The Canterwood HOA was the prevailing party.

There is no dispute that Canterwood HOA was the prevailing party, as the trial court granted its motion and dismissed Mr. Brain's Complaint. CP 445-48. As a result, all three elements are present and the Canterwood HOA should have been awarded its attorney fees.

There are no exceptions to RCW 4.84.330 when it applies. The language of the statute mandates an award of reasonable attorney's fees to the prevailing party where a contract so provides. *Singleton v. Frost*, 108 Wn.2d 723, 728, 742 P.2d 1224 (1987). "The denial of attorney's fees in circumstances such as this is not within the ambit of broad trial court discretion. *Id.* at 730. "While the amount awarded under RCW 4.84.330 is reviewed for abuse of discretion, the language is mandatory in

requiring an award of fees. *Quality Food Center*, 134 Wn. App. at 817. For those reasons, Canterwood HOA requests this court reverse the trial court's decision and grant Canterwood its attorney fees.

Canterwood not only enforced the CC&Rs based on the non-waiver provisions, it also enforced the CC&Rs to the extent it successfully defended against (1) Mr. Brain's allegation that Canterwood breached the CC&Rs rendering them unenforceable and (2) his claim for damages. Under all of those circumstances, Canterwood is entitled to its attorney's fees under the CC&Rs.

3. Canterwood rightfully argued below that it was not attempting any enforcement action against Mr. Brain.

In his Complaint, one of Mr. Brain's claims is that Canterwood has waived or is estopped from enforcing certain CC&Rs. CP 88. Canterwood argued that because Mr. Brain did not allege that there was any pending action by Canterwood and against Mr. Brain to enforce the CC&Rs, waiver and estoppel are not applicable because they are equitable defenses and cannot be used as a sword, only as a shield. Mr. Brain further argued below that an "enforcement action" as that term was used by Canterwood is irrelevant to his claims:

> Defendants either failed to understand the nature of

> the claims here or, are deliberately mischaracterizing the claims- basically setting up and knocking down a straw man. In fact, whether there is an existing enforcement action is irrelevant to the actual claim being made.
>
> The CCR at ¶ 6 provide that the purpose of the CCR is "to preserve and enhance the property values, amenities in Canterwood and to provide for the health safety and welfare of residents … The actual claim is that as a result of prior conduct of the Defendant over a period of years in relation to the CCR, those portions of the CCR at issue have been invalidated and, that the conduct of the Defendant in that regard has damaged the property values of every Canterwood Homeowner including the property owned by Plaintiffs. Likewise, Plaintiffs allege that Defendants conduct has placed at risk the health and safety of every Canterwood resident. The duties involved are express.

CP 243-44.

The duties to which Mr. Brain refers are the duties he has quoted from the CC&Rs which he alleges Canterwood breached.

4. Mr. Brain repeatedly attempted to enforce the CC&Rs

As discussed above, the only attempted affirmative enforcement in this case was Mr. Brain's unsuccessful attempts. In his Complaint, his subsequent pleadings, and during his arguments at the hearing, Mr. Brain repeatedly alleged and argued that Canterwood had breached or was in violation of certain CC&Rs, that the CC&Rs are invalid, and that one of his remedies was an injunction prohibiting Canterwood from enforcing those CC&Rs. CP 429-31. At one point, Mr. Brain

expressly stated: "[a]t this point in time, my property's title is under a cloud which effects its value because, among other things, there is a lawsuit over **whether or not those CC&Rs are valid**." CP 431 (emphasis added).

Ultimately, the trial court concluded that the Canterwood HOA was correct, that the CC&R's non-waiver provisions were enforceable, and that whatever remedy Mr. Brain seeks "has to wait until there is some negative or affirmative action . . . imposed upon [him] . . ." (i.e. Canterwood had not attempted any enforcement action against him) CP 432. Mr. Brain then stated:

> MR. BRAIN: Well, the complaint actually alleges that we have been threatened with an enforcement action because our fairway side of the property doesn't conform to the requirements of the landscaping guidelines.
>
> THE COURT: Then as to your particular property, the action can continue. I don't have any problem with that –
>
> MR. BRAIN: All right.
>
> THE COURT: -- because you have the entitlement to contest whatever it is. But there is a method in the CC&Rs for amendment of the CC&Rs. It is inappropriate, in light of that remedy, for the Court to intervene and simply say that these have been abandoned because I don't think they have been abandoned. On that basis, I'm going to grant the motion to dismiss as to the property writ large. As to your individual claim, that has vitality. I don't see any reason why you can't challenge that action Mr. Brain.

CP 432-33.

The trial court then agreed with Canterwood's argument that the non-waiver clause in the CC&Rs applied and that prohibits Mr. Brain's relief as it relates to invalidating the CC&Rs, but that he could continue with his individual claim. CP 433. As a result of Mr. Brain's representations to the trial court, further clarification ensued:

> THE COURT: Well, no. This is an action -- it's not declaratory relief, per se. They are entitled to bring their action, but they are bound by the terms of the CC&Rs because those, as Mr. Brain pointed out, have been recorded against his deed.... When he went ahead and exercised -- I guess I'll refer to it as a self-help method -- he was then threatened with monetary sanctions. That's the parameters that I see. If I have overlooked another specific complaint of yours, Mr. Brain, now would be your moment to point that out, but that's what I see in the complaint as your individual claim.
>
> MR. BRAIN: Yes. I think we were explicit that we believe the actions of the ACC was arbitrary and capricious, and, of course, we have alleged that those actions have caused property damage.

CP 439-40.

In dismissing Mr. Brain's claims, the trial court was clearly enforcing the non-waiver provisions of the CC&Rs as requested by Canterwood. However, based on Mr. Brain's representations to the trial court that Canterwood's actions violated the CC&Rs and that he suffered damages, which the trial court held should remain in the case, Canterwood submitted a proposed order for only a partial dismissal of Mr. Brain's claims. CP 400-442.

Mr. Brain has made a similar argument here stating in his Appellant's Opening Brief as follows:

> Appellants' offered evidence that they are being injured by the selective enforcement of the prohibition on removal of trees in the form of: "clogged and damaged gutters, dead lawns, clogged drainage systems, buckled sidewalks and driveways, enormous amounts of debris from every wind event and last but not least, the risk of a tree fall." This was in fact undisputed. These are cognizable injuries attributable to the selective enforcement of tree removal policies.
>
> Appellant's Brief at 20.
>
> So, with respect to injury, Appellant offered evidence of injury at multiple levels - damage to Appellant's property by overgrown trees, physical risk of injury, threatened enforcement actions and, damage to property values all attributable to the inconsistent enforcement of the Guidelines.
>
> Appellant's Brief at 27.

Mr. Brain is now specifically asking this Court to reverse the trial court, arguing there is an issue of fact over his damages. However, even though the trial court gave Mr. Brain the opportunity to pursue that claim, Mr. Brain objected to Canterwood HOA's proposed order for only a partial dismissal stating: "[p]laintiffs find themselves objecting to this form of order because it did not dismiss the action in its entirety". CP 444.

Mr. Brain ignored his own statements in his Response on Motion to Dismiss: "The First Amended Complaint asserts that

as a result, the HOA has breached its obligation "to preserve and enhance the property values, amenities in Canterwood and to provide for the health safety and welfare of residents ..." [CP 246] " and "[Canterwood] is alleged to be violating a basic express duty in the CCR." [CP 252]. As a result, Mr. Brain claimed "[a]s noted previously, the Complaint alleges that Defendant's conduct has damaged Plaintiff's property values." CP 251. Any attempt to re-cast his Complaint and the causes of action alleged to avoid a rightful award of attorney fees to the Canterwood HOA should not be permitted by this Court. Mr. Brain's demand that the trial court dismiss all of his claims bars him from now asserting that the trial court committed reversible error in so doing. *See In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995) ("Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal.").

5. The *Meresse v. Stelma* case does not apply here.

Mr. Brain is expected to argue that because he requested relief under the Declaratory Judgement Act, chapter 7.24 RCW, this is not an action based on the Canterwood CC&Rs and the fee provision is inapplicable citing to *Meresse v. Stelma*, 100 Wn. App. 857, 862, 999 P.2d 1267 (2000). In *Meresse*, both parties sought their attorney's fees pursuant to the fee provision in the

CC&Rs and the Court denied both requests. *Id*. at 858. The Court determined that Stelma was not entitled to fees because even though Stelma was entitled to amend the CC&Rs by a majority vote, the Meresses were entitled to challenge that amendment because it was an "unexpected expansion of the subdivision owners' obligations to share in road maintenance." *Id*. at 866. The court also determined that the Meresses were not entitled to fees because Stelma did not violate the "majority vote" provision in the CC&Rs since the amendment to the CC&Rs was approved by a majority vote. *Id*. at 869. The Court clearly explained why neither claim was based on the CC&Rs. If the Court wanted to hold that a declaratory action is not an action "on the contract" and therefore the fee provision in the contract was inapplicable, the Court would have simply made that statement. It did not.

D. Canterwood requests its attorney fees on appeal.

The Canterwood HOA requests its attorney fees on appeal pursuant to RAP 18.1, the attorney fee provision in the CC&R's, and the operation of RCW 4.84.330 for the reasons discussed at length above.

V. CONCLUSION

For the reasons stated herein, this Court should (1) affirm

the trial court's dismissal of Mr. Brain's Complaint with prejudice; (2) affirm the trial court's denial of class certification; and (3) remand the case to the trial court for a determination of a reasonable amount of attorney fees to be awarded to the Canterwood HOA.

DATED this 19th day of August, 2022.

The undersigned certify that this brief contains 7,716 words in compliance with RAP 18.17(c).

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the RESPONDENT/CROSS-APPELANT CANTERWOOD HOMEOWNERS ASSOCIATION'S BRIEF in Court of Appeals Case No. 56733-4-II to the following parties indicated below:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 19th day of August, 2022 at Seattle, Washington.

s/ Christine F. Zea
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